

DAVID M. GORDON
Claimant

SM & P UTILITY RESOURCE, INC.
Respondent

AMERICAN HOME ASSURANCE
Insurance Carrier

ORDER

APPEARANCES

RECORD AND STIPULATIONS

The Board considered the June 10, 2003 motion hearing transcript and the September 16, 2002 preliminary hearing transcript, together with the pleadings and other documents contained in the administrative file.

ISSUES

Judge Avery assessed the maximum weekly penalty of \$100 per week for the period from January 11, 2003 through June 10, 2003, for respondent's failure to pay claimant the ordered weekly temporary total disability compensation (TTD). ¹

Respondent contends its obligation to pay TTD compensation ended in February 2003 because claimant suffered an intervening accident and injury. In the alternative, respondent contends its obligation to pay TTD compensation ended April 21, 2003 because claimant reached maximum medical improvement on that date.

Claimant denies suffering an intervening injury and denies that he reached maximum medical improvement as alleged by respondent. Furthermore, claimant contends that respondent's obligation to pay TTD compensation continues for as long as the ALJ's Order remained in effect. Accordingly, claimant requests the Board to affirm the ALJ's assessment of penalties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant alleges he injured his left shoulder, right ankle and back through a series of accidents at work beginning June 10, 2001 through July 11, 2001. ² As a result of those accidents, claimant underwent surgery to his left shoulder on August 29, 2001.

On January 27, 2002, claimant was released to limited use of his left upper extremity with a 2½ pound lifting restriction and no overhead lifting or reaching.³ By that time, however, claimant had been terminated by respondent and was given no accommodated work and he has not been offered accommodated work.

Claimant underwent a second surgery on April 30, 2002.

On September 17, 2002, Judge Avery entered an Order for compensation which provided that:

Temporary total disability compensation is hereby and ordered paid by respondent and insurance carrier at the rate of \$376.99 per week, commencing February 27, 2002 through April 30, 2002 and commencing

¹ See K.S.A. 44-512a(a).

² Form K-WC E-1 Application for Hearing (filed July 25, 2001).

³ M.H. Trans., Cl. Ex. 1 at 3.

July 1, 2002 until further order, or until certified as having reached maximum medical improvement; or released to regular job; or until returned to gainful employment, whichever occurs first.

At the January 13, 2003 office visit with Dr. Randall, claimant was told to return in April for a re-check and a determination of whether he had reached maximum medical improvement.

On February 5, 2003, while off work and still recovering from his injuries, claimant slipped on some ice. Claimant did not fall but in his attempt to maintain his balance he temporarily aggravated his shoulder injury.

I was walking down the sidewalk, and there was ice, and the only thing I did was slip, but I didn't fall, and just yanked my arm back like - - how would I explain it - - like I was trying to catch myself, but I didn't fall all the way. I just yanked my arm back, and a pain shot through my shoulder, and I went and saw the doctor for it.⁴

On February 7, 2003, claimant returned to Dr. Randall's office. His records indicate that two days earlier claimant had slipped outside the American Response building where he was taking EMT classes. The chart note of February 7, 2003 from Dr. Randall states:

Mr. Gordon is a 27-year-old male who presents to clinic today for follow-up to left shoulder Bankart surgery. He claims while walking two days ago that he slipped on some ice outside of the American Medical Response building where he is currently taking classes for EMT. In slipping he threw his arm back with increased external rotation of the shoulder, causing a subluxing feeling. He did feel a pop in his left shoulder at the time. At this point he has limited range of motion with increased pain. He states that he is performing the activities that were asked by Randy during his last visit. He is currently using low weights of 2-5 lb[s] for his exercises. He has currently stopped performing the type of pushups in which the body is supported by the knees as he had done in previous weeks. This is quite painful for him to perform at this time.

. . . .

Impression: 1. Increased shoulder pain after recent fall [sic].
2. Residual improving pain following open Bankart repair.

⁴ M.H. Trans. at 8.

Plan: We will see Mr. Gordon back in four weeks. During this interim he will continue formal physical therapy and will work on rotator cuff strengthening. We expressed our interest with Mr. Gordon to continue conservative therapy at this time, and do not feel that surgical intervention is needed. We discussed rotator cuff strengthening that ultimately would help support the shoulder to keep the humeral head seated within the glenoid. He does have some laxity felt on the right shoulder as well, and he is right-hand dominant. He does not have any episodes of subluxation of this shoulder. It is felt that the strength of the rotator cuff muscles is helping to stabilize the right shoulder and over strengthening the rotator cuff muscles of the left would probably provide similar results. We will see the patient back in four weeks.⁵

Also, on February 7, 2003, four weeks of physical therapy three times a week was ordered.

Claimant's restrictions were modified February 13, 2003 to "can carry 15 pounds with left upper extremity but can not lift overhead." ⁶

On March 26, 2003 claimant filed a Demand for Compensation pursuant to K.S.A. 44-512(a) to respondent's counsel and insurance carrier.

On April 18, 2003 claimant filed a Request for Penalties pursuant to K.S.A. 44-512(a). A hearing on that motion was held before Judge Avery on June 10, 2003. At no time before that hearing did respondent file a motion or request a preliminary hearing to terminate the ordered TTD compensation. Claimant testified at the June 10, 2003 penalties hearing that he has not been released from care by his treating physician, Dr. Randall.

Claimant returned to Dr. Jeffrey C. Randall on April 21, 2003. Dr. Randall again recommended physical therapy. It appears his earlier recommendation for this had not been followed.

David has still been lacking from a rehabilitation standpoint with his shoulder. I still feel he need[s] formal physical therapy to be at maximal [sic] medical improvement. He would also benefit from a brace, as he has continued to have instability.

I do not think he will require further surgery if he can function well in his brace and complete appropriate rehabilitation. We have also instructed him how to do some

⁵ M.H. Trans., Resp. Ex. A at 3.

⁶ M.H. Trans., Resp. Ex. A at 2.

rehabilitation himself, and have provided him with Thera-Bands so he can work on a home program as well.⁷

Clearly, as of April 21, 2003, claimant's last examination, Dr. Randall did not consider him to be at maximum medical improvement. Furthermore, the record does not establish that claimant sustained a new accident and injury in February 2003. Accordingly, respondent had no basis for discontinuing temporary benefits. Moreover, even if claimant had suffered an intervening injury respondent should not have unilaterally discontinued compensation. The proper procedure would be to request another preliminary hearing and obtain an order from the ALJ terminating the previously ordered benefits. Therefore, the ALJ's order of penalties was appropriate and should be affirmed.

WHEREFORE, it is the finding, decision and order of the Board that the Order entered by Administrative Law Judge Brad E. Avery dated June 11, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and American Home Assurance
Brad E. Avery, Administrative Law Judge
Anne Haight, Workers Compensation Acting Director

⁷ M.H. Trans., Cl. Ex. 1.

